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SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 112

Davies Warehouse Company, a corporation,
Petitioner,

vs.

Prentiss M. Brown, Price Administrator,
Respondent.

Reply of Petitioner to Brief for the Respondent in Opposition

PRELIMINARY STATEMENT

Petitioner has no comment to make respecting that portion of respondent's brief preceding the argument (pp. 1-5), except to say that, in characterizing the question presented in this proceeding, respondent's over-emphasis of the fact that petitioner is a public utility under California law might create the impression that petitioner's plea for exclusion from the regulations imposed under the Emer-

gency Price Control Act of 1942 is based solely upon that fact. What petitioner actually contends is that it is a public utility within the meaning of Section 302(c)(2) of the Act, as amended, and, hence, is exempt from regulation thereunder not only because it is a public utility under California law but because it is a public utility *in fact* within the plain meaning of that section.

However, because petitioner is defined as a public utility under California law and is subject to maximum rate regulation by that State are not only important but conclusive factors as to whether or not it is exempt from regulation by respondent under the provisions of Section 302 (c)(2), as amended. Common carriers engaged in interstate or foreign commerce by rail, motor vehicle and water are exempt from regulation by respondent under Section 302(c)(2), as amended, for the same reason, i.e., because they are defined as common carriers and are subject to maximum rate regulation by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act.[1] Similarly exempt, for the same reason, are (a) public utilities or common carriers engaged in the transmission and sale in interstate commerce of electric power and gas under the provisions of the Federal Power Act;[2] (b) public utilities or common carriers engaged in the transmission in interstate commerce of telephone and telegraph communications under the provisions of the

1. Act Feb. 4, 1887, C. 104, 24 Stat. 379; 49 U.S.C.A. §§1 et seq.; Act Aug. 9, 1935, C. 498, 49 Stat. 543; 49 U.S.C.A. §§301 et seq.; Act Sept. 18, 1940, C. 722, Title II §201, 54 Stat. 929; 49 U.S.C.A. §§901 et seq.

2. Act June 10, 1920, C. 285, §320, added Aug. 26, 1935, C. 687, Title II, §213, 49 Stat. 863, 16 U.S.C.A. §§791a et seq.

Communications Act of 1934[3] and (c) certain classes of public utilities in some of the states (notably Iowa[4]) which are defined, and are subject to maximum rate regulation, as public utilities, by the municipalities of those states rather than by direct state control.

Let it be supposed that at the time of the passage of the Act there was no maximum rate regulation of interstate common carriers, power, gas, telephone and telegraph companies by the Federal agencies above named. Is it possible that Congress would have left them out of the price control features of the Act merely because they might be considered "traditional utilities"? We think not. It was because of the existence of maximum rate regulation by these Federal agencies which prompted Congress to exempt them from control by respondent.

ARGUMENT

A. Reply to Respondent's Argument That the Exemption in Section 302(c)(2) Is Analogous to Exemptions Contained in Taxing Acts (Res. Br. 5-6).

There can neither be narrow nor broad construction of the phrase "common carriers or other public utilities" as used in the exemption clause under question. These are words which should be given their natural significance,

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3. Act June 19, 1934, C. 652, §§1 et seq., 48 Stat. 1064 et seq., as amended; 47 U.S.C.A. §§151 et seq.

4. The rates of water, gas, heat and electric utilities are regulated by municipalities in Iowa by virtue of the provisions of Section 6143 of Chapter 312 of the Code of Iowa (1939), p. 1025.

bearing in mind that the main purpose of the Act in which they are contained is to prevent inflationary price rises.[5]

We fail to see how the cases of *Bank of Commerce v. Tennessee*[6] and *United States v. Stewart*[7] support respondent's position that the Emergency Court of Appeals might have dismissed the complaint solely in reliance of the principle announced therein. That principle is that those who seek an exemption from a tax must rest it on more than a doubt or ambiguity and that the exemption must be clearly defined and founded upon plain language.

In the instant case the exemption extends to "rates charged by any common carrier or other public utility". Respondent has conceded that petitioner is a public utility under California law. Under these circumstances, there could be no doubt or ambiguity as to the status of petitioner which is clearly defined as a public utility within the plain language of the exemption clause.

B. Reply to Respondent's Contention That Section 302(c)(2) Was Properly Construed So As to Be of Uniform Meaning Throughout the United States (Res. Br. 6 et seq.).

In this portion of the brief, respondent is making the same argument as that advanced by Judge Maris to the effect that petitioner's theory limits the scope of the application of the exemption clause in question and violates the principle that a federal statute will, in the absence of language in the statute to indicate a contrary intent, be given a general and uniform interpretation throughout

5. *Ozawa v. United States*, 260 U.S. 178, 194.
6. 161 U.S. 134, 146.
7. 311 U.S. 60, 71.

the country. In support of this position, Judge Maris cited the cases of *Lyeth v. Hoey*[8] and *Jerome v. United States*[9] (R. 111).

Neither this principle (with which we concur) nor the authorities cited in footnote 5 on page 6 of respondent's brief in support thereof can operate to deprive petitioner of its right of exemption.

Respondent persists in the inference that the result of petitioner's contention would be to make the exemption clause dependent solely upon the application of state laws. Our contention, which we have repeatedly asserted, is that the application of the exemption clause was made dependent upon those (1) federal, (2) state and (3) municipal laws which regulate the rates of common carriers and other public utilities. The Amendment of October 2, 1942, specifically mentions the "Federal, State, or municipal authority" having jurisdiction to consider proposed increases in rates of common carriers and other public utilities. The statute, therefore, is explicit that its application is to be made dependent, in part, upon the application and interpretation of state laws.

It is respectfully submitted that even if the exemption clause is not specifically made dependent, in part, upon the application of state laws, petitioner's contention calls for a general and uniform application of the exemption clause because (a) in any state where the warehouse business is regulated as a public utility, Congress exempted the rates and charges of that business from further regu-

8. 305 U.S. 188.
9. 318 U.S. 101.

lation; and (b) in every state where the warehouse business is unregulated, Congress intended that the Office of Price Administration would exercise direct price control by prescribing ceiling rates to carry out the purposes of the Act.

The same uniform result would be achieved with respect to any other class of common carrier or public utility which might be regulated in some states but not in others.

Are we to understand that, solely for the sake of peculiar ideas as to "standards", respondent assumes the position that he should not regulate utilities which in one or more states are not brought within federal or state regulation simply because he cannot, under the exemption, regulate the same class of utility in another state where there is such federal or state regulation? Are we to further understand that respondent's regulation over California public utility warehousemen is more important to the control of inflation than to allow much more comprehensive public utilities of other classes to entirely escape price control because of a strange and arbitrary dependence upon a uniform pattern?

Respondent testified before the House Banking Committee, as follows:

> "Now, as to the utilities. There is, as the members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial determinations, *of state regulations, and of state laws*. It seemed to those drafting the bill that this was an area which was not likely to give difficulty of to cause, so far as they could see at that time, any inflationary

trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates."[10] (Italics ours.)

While respondent may have had only state laws and state regulations in mind, Congress, nevertheless, decided not to limit the application of the exemption to existing state laws and regulations but extended it, as well, to existing Federal and municipal laws and regulations.

Since all "public utilities", as such, are not necessarily under federal maximum price regulation, it is perfectly natural to look to state laws for a determination of the meaning thereof. If a federal law said that public warehousemen are not public utilities, one need not go beyond that authority in interpreting the federal status, but where there is no federal definition the definition by the states is of great significance.

What is an intrastate "common carrier" or an intrastate "public utility"? Obviously, those which have been defined to be such by state statute and state regulatory laws, and these must be looked to for the purpose of determining what are "common carriers or other public utilities" within the meaning of the exemption clause.

The failure of Congress to specifically define any dividing line between the carriers and utilities which were to be exempt and those which were not could not, by the omission, prevent the interpretation of a federal law by making reference to a specific state standard where there is no federal standard in conflict therewith.

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10. House Hearings, pp. 54-55; see petitioner's opening brief, Appendix "A", p. i.

C. Reply to Respondent's Argument That It Was Not Intended to Make the Scope of the Administrator's Authority Dependent Upon the Non-Existence of State Rate Control (Res. Br. 7-8).

It so happens that Congress exempted "common carriers and other public utilities" from the Act, and had Congress any reservations in mind, it would have placed a limitation on the meaning of those words. There can be no controversy, we submit, over the meaning of words which in and of themselves are without controversy.

The object of the Emergency Price Control Act is to prevent unnecessary price rises. Congress has exempted "common carfiers or other public utilities" because their rates and charges are already under adequate regulation by existing federal, state and municipal authorities. There is no need for any additional regulation by the federal government through respondent nor for him to be confronted with an expensive staff of public utility experts who, at best, could do no better than to duplicate the pre-existing regulation set up by the federal government, the several states and certain municipalities.

This is the only sound and logical construction that can be drawn from the exemption contained in Section 302(c)(2) of the Act. The Amendment of October 2, 1942,[11] affirms this construction.

Are common carriers and other public utilities which are not subject to the jurisdiction of existing federal, state or municipal authorities to be considered as having freedom to increase their rates and charges without regulatory restraint? Inconceivably, the result of respondent's theory

11. Act Oct. 2, 1942, C. 578, §1, 56 Stat. 765; 50 U.S.C.A. App. §961.

would mean that as to what he terms the traditional utilities (common carriers, electric light and power, gas, heat, water, communications), there would be no price regulation whatever in those states and localities where federal, state or municipal regulation does not exist.

The classes of common carriers or other public utilities which would thus be able to increase their rates and charges at will, subject only to the giving of the thirty days' notice, as provided in the Amendment, would consist of (a) all common carriers by motor vehicle in the transportation of property in interstate commerce in a commercial zone;[12] (b) all common carriers and public utilities in Delaware; (c) common carriers by motor truck in three states; (d) common carriers by water in twenty-two states; (e) express common carriers in one state; (f) pipe line common carriers in twenty-three states; (g) electric utilities in six states; (h) gas utilities in seven states; (i) heat utilities in nineteen states and in the District of Columbia; (j) telephone utilities in one state; (k) telegraph utilities in three states; and (l) water utilities in seven states.[13]

D. Reply to Respondent's Discussion Regarding Legislative History of the Exemption Clause (Res. Br. 8 et seq.).

Our review of the discussions had before the Senate and the House and before their respective committes[14] demonstrates that the exemption was intended to extend to the rates of all "common carriers or other public utilities"

12. See petitioner's opening brief, pp. 28 et seq.
13. See Appendix "B" to petitioner's opening brief.
14. See Appendix "A" to petitioner's opening brief.

which are under adequate regulation by existing regulatory agencies, and there is not even a hint that public utility warehousemen were to be excluded any more than there is a hint that heat utilities were to be included.

May we ask what is a traditional public utility as regulated by a municipal authority and where in the law is the definition which Congress intended with respect to the exemption of common carriers and public utilities which are under the jurisdiction of municipalities? Obviously, Congress intended the answer to rest upon the existence or non-existence of an adequate municipal control of maximum prices of public utilities.

E. Reply to Respondent's Argument That the Legislative Repetition of the Phrase "Common Carrier or Other Public Utility" Is Persuasive Indication of Congressional Approval of the Existing Administrative Construction (Res. Br. 9-10).

While it is true that the Senate was expressly told that the Administrator had construed the exemption clause as exempting from his authority a telephone company which was not subject to state regulation, nevertheless that body, as well as the House of Representatives, has specifically declared, in the amendment, that the common carriers and utilities which are exempt from the Administrator's regulation are those which are subject to the jurisdiction of a federal, state or municipal authority.

During the pendency of the bill which was finally enacted as the Inflation Control Act of 1942, the Norris Amendment was introduced in the Senate which would have abolished the exemption contained in Section 302(c)(2). The bill went to conference where the Norris Amend-

ment was rejected and there was substituted in lieu thereof the proviso of Section 1 of the Inflation Control Act.[15] Thus an express limitation was placed upon the exemption so that, by reason of the amendment, Section 302(c)(2) was modified to read as follows:

> "Nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility" * * * "Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

Since the exemption clause and the amendatory clause relate to the same classes of common carriers or public utilities, it must follow from the language of the amendatory clause that those common carriers or public utilities which Congress intended to be outside of regulation by the Price Administrator are those, *and only those*, which are subject to the jurisdiction of a federal, state or municipal authority.

In view of the foregoing, it is respectfully submitted that, by the Amendment of October 2, 1942, Congress specifically disapproved the Administrator's construction of the exemption clause that he had no power to regulate the rates of a telephone company or other classes of utilities in localities where they are not under regulation.

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15. 88 Cong. Rec. October 2, 1942, pp. 7970, 7971; see pages xx et seq. of Appendix "A" to petitioner's opening brief.

F. Reply to Respondent's Contention That the Interpretation of the Exemption Provision by the Court Below Avoids Several Consequences Inimical to Effective Price Control (Res. Br. 9 et seq.).

Respondent urges that "Without coherent federal regulation of the charges for such services (common carrier and public utility services) the establishment and maintenance of maximum prices for those commodities would be rendered immeasurably more difficult."

We do not believe this to be true. The prescribing of maximum rates and charges by the Railroad Commission of the State of California (or any other rate regulatory body), together with the Administrator's right to intervene on behalf of the public, fully and completely serves the price stability intended by the Act. Should the Price Administrator have reason at any time to believe that the rates or charges of any California warehouseman (or of any warehouseman in any state which regulates their rates and charges) have become or threaten to become inflated, he could petition the Commission to issue its order compelling a reduction in such rates and charges to the extent that they may be shown to be inflated.

Respondent goes on to say that:

> "As the court below recognized, the alternative interpretation would have created serious administrative difficulties. The determination of the existence of valid state public utility regulation would be difficult at best, and at worst, impossible. The economic basis for the state's action would have to be appraised against a background of state and federal constitutional law. Even should the Administrator determine the exercise of legislative authority to be constitutionally well founded, the substantive nature of the

> regulation, the precise coverage of the state statutes, and their actual administration would still require investigation. To have required the Administrator to make such determinations would be to require him to embark upon investigations not only irrelevant to, but inconsistent with, the important tasks assigned to him by Congress."

This excuse of an inability to perform a duty plainly indicated by the Act is as weak as it is unfounded. The determination of the existence of valid state public utility regulatory provisions is as simple as a cursory examination of the statutes of the states affected. There is nothing hidden about these state laws.

Finding by simple search the existence of a valid law empowering regulation by a state of the rates of a common carrier or other public utility, respondent would only have to communicate with the regulatory agency of that state with respect to its administrative standards, and the economic factors involved, reserving the right (a) to require a public hearing and (b) to intervene in any particular public utility warehouse rate proceeding if, for any reason, it would appear to be that important.

The time which respondent would thus conserve could be devoted by him to the regulation of the prices of unregulated industries, including, of course, unregulated common carriers and other public utilities.

If a common carrier or other public utility is not under regulation by an existing federal, state or municipal authority it would appear to be the duty of respondent to ascertain that fact as well as the economic factors

involving such common carrier or public utility, to the end that its rates should not be permitted to become inflated.

G. Reply to Respondent's Argument That the Public Warehousing Business Is Covered by the Act Because, Under Section 302(c) Thereof the Term Commodity Includes Services Rendered in Connection With the Storage of a Commodity (Res. Br. 11-12).

If it be true that the definition of a commodity includes services in connection with the "storage" (by a public utility warehouseman) and "distribution" of a commodity, railroads and other common carriers would also be included within the price control features of the Act, since they engage in the business of the "distribution" of commodities. Congress could not have intended, under Section 302(c), to exempt common carriers without exempting public utility warehousemen. While it is true that rates of certain storage facilities are subject to the control of respondent, nevertheless when a storage enterprise is conducted as a public utility, it falls within the provided exemption, which is dominant and controlling.[16]

Most assuredly do we question the statement of respondent on page 11 of his brief that

> "The administrative determination that the bulk of storage services are furnished by public warehouses is unquestioned."

Unless actually in transit, storage is necessary by one means or another of all raw materials and all processed

16. This conclusion was reached by Chief Judge Vinson in his dissenting opinion (R. 143). See pages 26 to 31 of petitioner's opening brief for a more detailed discussion of this subject.

or manufactured goods until they have finally reached the consumer or the shelves of the retailer in the shape required for use.

To say that the bulk of storage services are furnished by public warehouses is to spread very thin the commodity wealth of our nation in either raw materials awaiting manufacture or of semi-processed or fully manufactured products awaiting sale to jobbers, wholesalers or dealers whose numbers are in the hundreds of thousands.

Even without reference to the stockpiles of raw materials stored on the premises of manufacturers, it is conceivable that private storage in the premises leased or owned by manufacturers, wholesalers, jobbers and dealers for the storage of their own merchandise in manufactured form will not only exceed the capacity of public warehousing facilities but will exceed it by at least ten or more times.

It is for this reason that Congress included in the term "commodity" in Section 302(c) the services rendered in the "distribution" and "storage" thereof so that the charges for these services, when performed in a private capacity, would not escape control. It was no more intended to regulate public storage maximum prices where they were already under adequate government regulation than it was intended to regulate "distribution" by common carriers which is a designation that would embrace all common carrier services.

H. Reply to Respondent's Contention That a Good Indication of the Common Understanding of the Term "Public Utility" May Be Found in the Use Made of It Generally by the State Legislatures (Res. Br. 12-13).

Here we find respondent resorting to the laws enacted by state legislatures in his frantic effort to find grounds to declare that regulated public utility warehousemen are not public utilities within the meaning of Section 302(c)(2) of the Act. And at the same time he wishes to ignore the circumstance that, where a state legislature has long provided for state regulation of a business as that of a public utility, it was that type of utility which Congress had in mind in enacting the exemption.

In Appendix "B" to our opening brief, it is shown that there are only twenty-six states which do not include any type of warehouse in the statutory definition for purposes of rate regulation; that California, Indiana, Minnesota and North Dakota regulate the rates of warehousemen without limitation; that Arkansas regulates the rates of farm products warehouses only; that Georgia regulates warehouse rates when warehouses are maintained by a railroad; that Illinois, Kansas, Missouri, Nebraska and South Dakota regulate the rates of grain warehouses only; that Iowa regulates the minimum rates on agricultural products stored in bonded warehouses only, with the power in the Iowa State Commerce Commission to change the minimum rates; that North Carolina regulates the maximum charges of tobacco warehouses only; that Oklahoma regulates the rates of grain, cotton and broom corn warehouses only; that Oregon regulates the rates of grain and hay warehouses only; that Nevada and Texas regulate

the rates of warehouses when used in connection with railroads; that Washington regulates warehouses in counties of 30,000 population or more; and that Idaho, Maine, Utah and Wisconsin regulate the rates of warehouses when used in connection with common carriers.

There is nothing misleading about the chart attached to petitioner's opening brief as Appendix "B" as respondent charges in footnote 17 on page 13 of his brief. The statutory references (Appendix "C" of petitioner's opening brief) support every conclusion shown on the chart. We confidently assert that 22 states regulate warehouses as public utilities under the doctrine of *Munn v. Illinois*[17] and not as milk vendors under *Nebbia v. New York*.[18] Petitioner not only infers, but states as a fact, that these twenty-two states regulate warehousemen as public utilities. Significantly, seventeen of these twenty-two regulate the rates of these public utility warehousemen by and through railroad, public utility or public service commissions, namely: Arkansas, California, Georgia, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, Nebraska, Nevada, North Dakota, South Dakota, Texas, Utah, Washington and Wisconsin.

However, it is really unimportant whether or not, three, eight, seventeen or twenty-two states regulate the rates and charges of public utility warehousemen. Respondent concedes that some states exercise maximum rate regulation over public utility warehousemen as defined in those states. To the extent of that regulation, the exemption

17. 94 U.S. 113.
18. 291 U.S. 502.

contained in Section 302(c)(2) applies. *All* other warehouse rates and charges are subject to the control of respondent. This rule of construction applies to all other classes of common carriers and public utilities.

Nebbia v. New York, supra, discussed on page 13 of respondent's brief, involved the power of the State of New York to prescribe by statute maximum prices for the sale of milk. The statute was upheld as a proper exercise of the police power because the regulation of maximum milk prices was necessary as a health measure and in the interest of the welfare of the people of that State. The regulation of the warehouse industry in the twenty-two states shown on our chart could not be justified as a health measure or upon any ground other than that they are operating as public utilities.

Munn v. Illinois, supra, mentioned on page 14 of respondent's brief, arose upon an information filed in the Criminal Court of Cook County, Illinois, against the plaintiffs in error (Munn and Scott) for transacting business as public warehousemen without a license. The defendants admitted the facts charged, but alleged that the statute, requiring the license, was unconstitutional for attempting to fix the maximum rates of storage. In holding that this regulation by the State of Illinois constituted a proper exercise of the police power which did not contravene the Fourteenth Amendment, this Court said, in part (p. 131 of 94 U.S.):

> "Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pur-

> sues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very 'gateway of commerce', and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.'"

The case held that the State of Illinois could properly fix maximum storage rates for public warehouses on the ground that they were engaged in a business as to which the public interest demanded regulation. The decision in the *Nebbia* case does not affect that holding but merely sustains the exercise of the police power by the State of New York in fixing maximum milk prices upon a different ground.

The *Nebbia* case cannot be considered as having in any way affected the holding of the *Munn* case that a public warehouseman, for the purposes of maximum rate regulation, is engaged in a business which the public interest demands shall be regulated. The *Nebbia* case discussed the *Munn* case only for the purpose of rejecting the claim made by the appellant that the court in the *Munn* case "in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates."[19] This Court then went on to explain why appellant's claim was based upon a misconception of the *Munn* case.

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19. 291 U.S. at page 532.

It doesn't make any difference whether the Court in the *Munn* case was attempting to define the term "public utility," in accordance with the layman's interpretation of the term. What the Court was dealing with was "a business which public interest demands shall be regulated" as was pointed out in the *Nebbia* case. The "business which public interest demands shall be regulated" was the warehouse business.

While it may not be important as to what the technical definition of the term "public utility" may be, the important point is that the warehouse business has been declared by the State of California and twenty-one other states to be a "business which public interest demands shall be regulated," and it has been regulated as such.

Any case involving the term "public utility" must reach for its fundamental premise to the *Munn* case, which is generally recognized as the public utility landmark in American law. Any case concerning whether or not a particular business is that of a public utility must inevitably be considered in the light of that case.[20]

I. Reply to Respondent's Argument That the Term "Public Utility" Is Limited in Its Scope to Common Carriers and to Such Utilities as Electric, Gas, Telephone, Telegraph, Water and Heat Utilities (Res. Br. 13-14).

Respondent discusses *Nebbia v. New York*,[21] *Pulitzer Publishing Company v. Federal Communications Commis-*

20. See Spurr's "Guiding Principles of Public Service Regulation" (Public Utilities Reports, Inc. 1924) pp. 27, 28, and Encyclopaedia Britannica, Vol. 18, p. 746. See also Chief Judge Vinson's discussion of the *Munn* case in his dissenting opinion (R. 132).

21. 291 U.S. 502, 534.

sion,[22] Mr. Justice Frankfurter's book entitled "*The Public and Its Government*",[23] *Moody's Manual of Public Utilities*[24] and *Standard and Poor's Trade and Security Index for 1941*, in an attempt to show that the definition of a public utility is limited to common carriers and to such utilities as electric, gas, telephone, telegraph, water and heat utilities (Res. Br. 14). A careful reading of these authorities and manuals does not warrant the conclusion that there was any intention to restrict the term "public utility" to the examples set forth therein.

For example, while it is true that in "The Public and Its Government", the statement is made (p. 81) that: "To think of contemporary America without the intricate and pervasive systems which furnish light, heat, power, water, transportation, and communication, is to conjure up another world", yet, we find on page 83 (in discussing the historical development of regulation) the following statement:

> "So, legislatures began to experiment with early forms of continuous administrative oversight of railroads and, in the wheat regions, of *grain elevators*". (Italics ours.)

In *Budd v. State of New York*,[25] this Court held that grain elevators and warehouses are charged with the public interest and occupy a position in the community "analogous to that of common carriers" so as to make them proper subjects for state regulation.

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22. 94 Fed.(2d) 249 (App. D.C.) 251.
23. Yale University Press (1930) p. 81.
24. 1942 Ed. p. a3 and pp. a83, a91.
25. 143 U.S. 517.

Why does respondent fail to mention the business of ginning cotton which has been specifically declared to be that of a public utility by this Court?[26]

We need only turn to the well known encyclopaedias which, we submit, would be the first place any person would look for a definition of the terms "common carrier" and "public utility".

The Encyclopaedia Britannica contains this statement in the article entitled "Public Utilities":[27]

> "The following have been treated as and classified into groups of public utilities: (1) services of transportation (common carriers); (2) services incidental to transportation; (3) services facilitating communication; (4) facilities providing power, light, heat and refrigeration; (5) facilities providing water and sanitation in urban communities; (6) facilities regulating water supply for agricultural purposes."

The services which are rendered by a public utility warehouseman fall within the second classification above, inasmuch as they are "services incidental to transportation". Commercial storage is inseparable from transportation because, without a place of storage, there could be no inventory to demand the use of transportation.

The bulk of property which is stored by commercial warehousemen is brought to or taken from their warehouses by a common carrier. Any commercial warehouseman worthy of the name has rail spur track facilities on which rail freight cars are spotted and their contents

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26. *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515.

27. Vol. 18, p. 745.

are loaded into or taken from the warehouse facility. As so well expressed by this Court in the *Munn* case, "they stand * * * in the very 'gateway of commerce', and take toll from all who pass".[28]

The facility would also have a truck platform for loading and unloading. It may be generally stated, without challenge, that property going to or from storage in a commercial warehouse is brought to or taken from it by a common carrier by rail and truck and also by vessel in those instances where the warehouse is so located as to be able to take shipside deliveries. These common carriers, particularly the railroads, could not properly function without the availability of these warehouses to act as a link in the chain of transportation.

Property brought into the warehouse remains in storage until the time arrives for its ultimate delivery. Except in those instances when the consignee of the property takes delivery out of the warehouse by means of his own or contract carrier transportation facilities, the delivery services are performed either by local common carrier draymen operating within the local area of distribution or by rail or truck common carriers for re-transportation into extended areas of distribution.

The definition of the term "public utility" in *Encyclopaedia Americana*[29] and *Nelson's Perpetual Loose Leaf Encyclopaedia*[30] includes warehouses.

The commercial warehouseman and common carrier could not function without each other. It is for this

28. 94 U.S. 113, 131.
29. Vol. 22, pp. 778-779.
30. Vol. X, p. 91A.

reason that in some states (California, Idaho, Maine, Texas, Utah and Wisconsin), the statutory definition of a public utility warehouseman is one who operates a warehouse "in connection with or to facilitate the transportation of property by a common carrier".[31]

It is important to note that the Uniform Warehouse Receipts Act has been adopted by forty-six states, thus giving the use of warehouse receipts significance equal to that of a common carrier's bill of lading.[32]

The United States Warehouse Act,[33] to which respondent refers on page 15 of the brief, is an act permitting certain agricultural warehouses to obtain a license in order to issue bonded warehouse receipts so as to extend their negotiability in far removed money markets by reason of a government license and the protection of a good and sufficient bond. This, we submit, is not a statute to regulate maximum rates and it obviously has no pertinency to the issue raised in this proceeding.

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31. *California*—Section 2(aa) of the California Public Utilities Act, California Statutes 1915, p. 118; Deering's General Laws of California (1937) Volume Two, p. 3124. *Idaho*—Section 59-128 of the Idaho Code Annotated (1932), Vol. 3, p. 832. *Maine*—Section 15 of Chapter 62 of Maine Revised Statutes (1930), p. 1029. *Texas*—Article 6445 of Vernon's Texas Statutes (1936), p. 1183. *Wisconsin*—Section 195.02 of Wisconsin Statutes (1937), p. 2002.

32. References to the statutes whereby the forty-six states have adopted the Uniform Warehouse Receipts Act will be found in Appendix "A" hereto attached.

33. C. 313, 39 Stat. 486, et seq., 7 U.S.C. §§241-273.

J. Reply to Respondent's Contention That the Administrator's Interpretation of the Act Is Entitled to Great Weight (Res. Br. 16).

Finally, respondent states (Res. Br. 16):

> "It is clear that the Administrator's interpretation of the Act is entitled to great weight. Approval of such an interpretation by the special court created to review the validity of the Administrator's regulations and orders should normally be sufficient to settle the controverted question."

In making the statement that the Administrator's interpretation of the Act is entitled to great weight, respondent cites no authority, but undoubtedly relies upon the principle announced in *United States v. American Trucking Associations, Inc.*,[34] where this Court said:

> "The Commission (Interstate Commerce Commission) and the Wage and Hour Division, as we have said, have both interpreted Section 204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'."

The quoted language, which is taken verbatim from *Norwegian Nitrogen Products Co. v. United States*,[35] indicates to us that what this Court had in mind was

34. 310 U.S. 534, 549.

35. 288 U.S. 294, 315.

contemporaneous construction of a statute by such administrative agency as to the administrative provisions of a statute. Surely the doctrine was not intended to extend to a situation where, as here, such contemporaneous construction would do violence to the plain language employed in the statute.

A distinction should be drawn, we feel, as between the interpretation by such agency of a statute in connection with its administration; on the one hand, and its interpretation with respect to whether or not such agency has jurisdiction over a person involved in the statute, on the other. The latter involves a question of law which should be reserved exclusively for determination by the courts.

To adopt respondent's construction of Section 302(c)(2) in the instant case would rob the words "common carrier or other public utility" of their natural significance as applied to the purposes of the Act.

The interpretation of the exemption clause whereby public utility warehousemen are excluded from the provisions thereof was made by Leon Henderson at the time that he was Price Administrator. His successor (the present respondent), while a member of the United States Senate, was manager of the bill which was later enacted as the Inflation Control Act of 1942.[36] As heretofore discussed, this particular bill was sent to conference where, among other things, the Norris Amendment, which would have abolished the exemption created by Section 302(c)(2), was rejected and, in lieu thereof, the proviso of Section 1 of the Inflation Act was adopted. In discussing this substi-

36. Act Oct. 2, 1942, C. 578, 56 Stat. 765; 50 U.S.C.A. App. §§961 et seq.

tute, Senator Brown had this to say on the floor of the Senate:

> "Mr. Brown. Mr. President, section 1 of the conference report follows section 1 of the Senate bill; in fact, I can say very generally the conferees adopted the Senate bill with some slight modifications. The principal change in section 1 is that the Norris amendment which gave the President an all-over control of public-utility and common-carrier rates is stricken from the bill. *There is substituted for it a provision which will require any public utility which asks for an increase in rates to notify the President and to assent to the appearance of such agent as the President may designate to appear in behalf of the consuming public before the appropriate railroad or public utility commission, be it a State, Federal, or municipal commission.*" (Italics ours.)[37]

In view of Mr. Brown's statement, it is hard to believe that, as Price Administrator, he would construe the exemption clause as excluding public utility warehousemen who are under adequate regulation by a state commission. Chief Judge Vinson is now Economic Stabilization Director and, in this latter capacity, has control of the administration and enforcement of the Emergency Price Control Act of 1942, as amended. In view of his vigorous dissent in the instant case, it is hardly conceivable that he would interpret Section 302(c)(2), as amended, as excluding public utility warehousemen from the operation of the exemption clause.

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37. 88 Cong. Rec. October 2, 1942, p. 7970; see petitioner's opening brief, Appendix "A", pp. xx-xxi.

We direct attention to this anomalous situation for the purpose of showing that the "great weight" rule should have no application in a situation where a governmental agency has construed a statute upon a question of jurisdiction over a person involved in the statute.

K. Reply to Respondent's Contention that the Affirmance of His Interpretation by the Emergency Court of Appeals Is Sufficient to Settle the Controverted Question (Res. Br. 16).

All that petitioner has a right to ask is its day in court. We cannot take respondent seriously if he contends that petitioner has had its "day in court" because the majority opinion of the Emergency Court of Appeals has upheld the interpretation of the Administrator in the face of, *first*, a vigorous dissenting opinion by Chief Judge Vinson, *second*, the fact that the concurring opinion of Judge Magruder was prefaced with the remark that "With some hesitation, I concur in the result reached by Judge Maris. This is one of those unfortunate cases where doubts would remain whichever way the case was decided," (R. 118) and, *third*, the fact that Judge Maris concurred in the views expressed by Judge Magruder. (R. 119)

CONCLUSION

It was not, and is not, the purpose of petitioner to escape regulation. Petitioner realizes that inflationary tendencies must be checked in the proper prosecution of the present war.

The point that we wish to bring home is that petitioner is already under the adequate and complete control, as to its rates and charges, of the Railroad Commission of the State of California. It does not, and cannot, object to that regulation. It has been living under it for a number of years. What petitioner does object to is being singled out for double regulation where none is necessary and where none was intended.

It is enough that petitioner is required to comply with the laws of the State of California pertaining to the maximum rates which it shall charge for the services which it renders as a public utility. Under the provisions of those laws, petitioner must make an adequate showing before the Railroad Commission of California that any increase in rates proposed by it is justified. The process which a public utility in California is required to undergo in order to make that showing is extremely burdensome and expensive.

It is asking too much, when Congress did not intend it, that petitioner and other public utility warehousemen, after securing from the California Railroad Commission an order authorizing them to increase their rates, should then be required, with attendant delay and further expense, to obtain similar authorization from the Price Administrator.

Petitioner must obey the provisions of the Public Utilities Act of California *because it is a public utility.* It has been told by respondent that it must obey the provisions of the Emergency Price Control Act of 1942 *because it is not a public utility.* It is hoped that this Court will relieve petitioner from the intolerable position in which it has been placed as the result of an arbitrary interpretation of the Act by respondent in direct conflict with the intent of Congress.

Respectfully submitted,

REGINALD L. VAUGHAN,
Counsel for Petitioner.

Dated at San Francisco, California
September 23, 1943.

(APPENDIX FOLLOWS)

Appendix "A"

Statement Showing States Which Have Adopted the Uniform Warehouse Receipts Act and the Statutory References in Support Thereof.

State	Statutory Reference	State	Statutory Reference
Alabama	Laws 1915, p. 661	Montana	Laws 1917, ch. 154
Arizona	Laws 1921, ch. 47	Nebraska	Laws 1909, ch. 152
Arkansas	Laws 1915, act 273	Nevada	Laws 1913, ch. 269
California	Laws 1909, ch. 290	New Jersey	Laws 1907, ch. 133
Colorado	Laws 1916, ch. 226	New Mexico	Laws 1909, ch. 38
Connecticut	Laws 1907, ch. 220	New York	Laws 1907, ch. 732
Delaware	Laws 1917, ch. 221	North Carolina	Laws 1917, ch. 37
Florida	Laws 1917, ch. 7403	North Dakota	Laws 1917, ch. 250
Georgia	Laws 1937, pp. 390-413	Ohio	Laws 1908, p. 400
Idaho	Laws 1915, ch. 31	Oklahoma	Laws 1915, ch. 288
Illinois	Laws 1907, p. 477	Oregon	Laws 1913, ch. 305
Indiana	Laws 1921, ch. 100	Pennsylvania	Laws 1909, No. 13
Iowa	Laws 1907, ch. 160	Rhode Island	Laws 1908, ch. 1549
Kansas	Laws 1909, ch. 262	South Dakota	Laws 1913, ch. 364
Kentucky	Laws 1938, ch. 146	Tennessee	Laws 1909, ch. 336
Louisiana	Laws 1908, act 221	Texas	Laws 1919, ch. 126
Maine	Laws 1917, ch. 143	Utah	Laws 1911, ch. 139
Maryland	Laws 1910, ch. 406	Vermont	Laws 1912, No. 186
Massachusetts	Laws 1907, ch. 582	Virginia	Laws 1908, ch. 290
Michigan	Laws 1909, No. 303	Washington	Laws 1913, ch. 99
Minnesota	Laws 1913, ch. 161	West Virginia	Laws 1917, ch. 8
Mississippi	Laws 1920, ch. 218	Wisconsin	Laws 1909, ch. 291
Missouri	Laws 1911, p. 431	Wyoming	Laws 1917, ch. 96